Supreme Court, U.S.
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No. 01-0990

In the
# Supreme Court of the United States

LEE YEAGER,
*Petitioner*,

v.

GENERAL MOTORS CORPORATION,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## RESPONDENT GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION TO LEE YEAGER'S PETITION FOR WRIT OF CERTIORARI

DANIEL G. GALANT
*Counsel of Record*
GENERAL MOTORS CORPORATION
300 RENAISSANCE CENTER
DETROIT, MI 48265
(313) 665-4898

ROBERT S. WALKER
JOHN Q. LEWIS
JONES, DAY, REAVIS & POGUE
NORTH POINT
901 LAKESIDE AVENUE
CLEVELAND, OH 44114-1190
(216) 586-3939

*Counsel for Respondent General Motors Corporation*

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

14pp

## QUESTIONS PRESENTED

Petitioner Lee Yeager, a white male, applied for a skilled trade bargaining unit job position with General Motors Corporation ("General Motors") in 1996 and 1997. Because his test and interview scores were well below those of several other applicants, he was not given a job. He was eliminated from consideration prior to, and without regard to, any affirmative action by General Motors. The District Court for the Northern District of Ohio held that Yeager lacked standing to pursue a reverse discrimination claim under Title VII of the Civil Right Act of 1964, 42 U.S.C. §§ 2000e et seq., and the Sixth Circuit affirmed.

The Petition raises the following issues:

(1) Did the Court of Appeals for the Sixth Circuit reversibly err in affirming the Ohio District Court's grant of summary judgment in favor of General Motors on standing grounds, when the undisputed evidence established that Yeager was not eligible for a job position, whether the alleged affirmative action had been undertaken or not.

(2) Did the Sixth Circuit reversibly err in affirming the District Court's grant of summary judgment in favor of General Motors on Yeager's Fifth Amendment claim, when he failed to submit any proof that General Motors' voluntary, collectively bargained pre-apprentice program constituted federal action.

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# RESPONDENT GENERAL MOTORS CORPORATION'S BRIEF IN OPPOSITION TO LEE YEAGER'S PETITION FOR WRIT OF CERTIORARI

## STATEMENT OF THE CASE

The Court of Appeals for the Sixth Circuit and the Ohio District Court accurately set forth the pertinent facts related to Yeager's claims. [Pet'r App. pp. 4a-9a, 20a-24a]. Briefly stated, this case involved Yeager's two applications for apprentice job positions with two separate General Motors facilities - - first, in 1996, to the Lordstown, Ohio assembly plant, and second, in 1997, to the Lordstown metal fabrication plant.[1] On both occasions, Yeager was eliminated from consideration, prior to and without regard to any of the alleged affirmative action he challenged, because he was outscored by several other white male applicants during the apprentice selection process.

## I. CLARIFICATION OF RECORD

The "facts" recited in the Petition bear little resemblance to the record facts below. As an example, Yeager states that "GM has maintained fixed percentages of minorities and women in its skilled-trades apprenticeship job class through a number of so-called 'reverse' discriminatory practices in its apprentice selection process." [Petition p. 3]. Aside from the unsupported legal conclusion he asserts, Yeager does not articulate what percentage of minorities and

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[1] Yeager also had applied for an apprentice position in 1991 and 1993, but conceded in oral argument before the Sixth Circuit that he lacked standing to maintain a claim with respect to those applications. [Pet'r App. p. 11a n.2].

women General Motors had allegedly "fixed" or where in the record this alleged "fact" is located.

The evidence below instead establishes that 80% of the job position slots sought by Yeager had been filled by white males. [Pet'r App. p. 14a]. The number of white males (and minorities and females) hired for apprentice positions varied from job to job depending on the number of qualified candidates. [E.g., Pet'r App. pp. 20a-22a, explaining apprentice selection process]. There is nothing in the record, nor could there be, to support the notion that minority and female hiring ratios were "fixed" by General Motors.

Yeager also asserts (without record support) that, "[b]efore hiring from the top of those [apprentice] lists, GM conducts a 'race' and 'sex' analysis to determine whether the prospective hirees will include enough minorities and females to meet its perceived 'affirmative-action' percentage requirements." [Petition p. 4]. Nothing in the record supports this remark, either. There is no evidence that General Motors had "affirmative action" percentage "requirements" or of what those "requirements" supposedly were. In reality, there was no "requirement" that any number of minorities and females be hired.

## II. YEAGER'S CLAIMS

Yeager's claims boil down to his challenge to two procedures undertaken on a limited basis by General Motors in connection with apprentice hiring, neither of which had any effect on Yeager's unsuccessful attempts to obtain a job with General Motors.

The first, "targeting," as it is referred to by Yeager, is nothing more than General Motors seeking out qualified

minority and female applicants to compete for available apprentice positions. When interested and qualified minority and female applicants were identified, General Motors occasionally allowed them to bypass the random draw process (i.e., the random selection of persons to be permitted to sit for the apprentice exam). Those individuals did not displace any others (including Yeager), and they still had to compete for all apprentice positions by taking the apprentice test and, if they scored well enough, submitting to interviews. [See Pet'r App. pp. 15a-16a, 23a, discussing pre-test hiring procedure].

The second, "PATP," referring to pre-apprentice training, was another hiring procedure that had no effect on Yeager's unsuccessful applications. Pursuant to its national collective bargaining agreements with the International Union UAW, General Motors sometimes offered a limited number of qualified minorities and females a chance to improve their apprentice scores if they successfully completed a pre-apprentice training program. [See Pet'r App. pp. 5a-7a, 33a-34a].

Because of Yeager's extremely low apprentice scores, he was eliminated from consideration for a position at both General Motors plants before it considered or implemented PATP. Indeed, Yeager's Petition omits the fact that, in 1996, prior to any affirmative action, the Lordstown assembly plant compiled its preliminary list of the top 50 apprentice candidates (each of whom was a white male), and Yeager was not on the list. [Pet'r App. pp. 7a-8a]. Regarding Yeager's 1997 application to the Lordstown fabrication plant, even had he been entitled and permitted to transfer previous test scores to that plant, and even had he earned the maximum interview score, he still would not have been hired, because other, more qualified candidates had earned higher scores. [Pet'r App.

pp. 15a-16a].[2]

## REASONS FOR DENYING THE WRIT

## I. YEAGER HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." Id. Yeager has not presented any compelling reason for this Court to exercise discretionary jurisdiction over his appeal of the dismissal of his claim.

### A. YEAGER'S LACK OF STANDING

Fundamentally, Yeager's lack of Article III standing makes this case the wrong vehicle to address any perceived Title VII or constitutional issues raised in the Petition. At each level in the courts below, the undisputed facts established that Yeager had not been affected by the hiring procedures he challenged. [Pet'r App. pp. 9a-16a, 25a-29a]. His lack of standing should alone warrant the denial of the Petition.

In fact, Yeager does not argue that the Sixth Circuit's standing analysis conflicted with that of any other court of appeals or state court of last resort, nor could he do so. The Sixth Circuit followed the established three-part test in affirming dismissal on standing grounds. See Northeastern

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[2] Indeed, there is no evidence in the record, nor could there be, that PATP was conducted at the Lordstown fabrication plant in 1997.

Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 663-64 (1993); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992). See also Brunet v. City of Columbus, 1 F.3d 390, 397 (6th Cir. 1993) (holding that, for reverse discrimination Title VII claims, a plaintiff must establish that, "but for the [affirmative action] program, he would have been considered for the job").

The Sixth Circuit's holding is fully consistent with those from other jurisdictions that have decided whether Title VII reverse discrimination claimants have standing to pursue their claims. E.g., Grahek v. City of St. Paul, 84 F.3d 296, 298 (8th Cir. 1996) (affirming summary judgment and holding that "[plaintiffs] did not have a ranking adversely affected by" affirmative action); Hartman v. Duffey, 19 F.3d 1459, 1471 (D.C. Cir. 1994) (holding that "an employee who was not aggrieved by a particular test or hiring requirement lacks standing to challenge that test or requirement"); Billish v. City of Chicago, 962 F.2d 1269, 1280 (7th Cir. 1992) (affirming dismissal of plaintiffs' claim on standing grounds and holding that, "even had the [defendant] made the promotions in strict rank order, those . . . plaintiffs would not have been promoted"), rev'd on other grounds, 989 F.2d 890 (7th Cir. 1993) (en banc); Donaghy v. City of Omaha, 933 F.2d 1448, 1455 (8th Cir. 1991) (holding that the plaintiff had shown no "distinct and palpable injury" because he would not have been promoted even had the promotions been made in strict rank order without regard to affirmative action), cert. denied, 502 U.S. 1059 (1992).

We know of no case permitting a claimant to challenge a hiring procedure implemented by a private employer that had no effect on the decision not to hire him.

Yeager asserts that the Sixth Circuit "flat-out ignored" this Court's decision in Regents of University of California v. Bakke, 438 U.S. 265 (1978). That assertion is wrong. Both the District Court and the Sixth Circuit considered Yeager's argument that Bakke was pertinent to the standing analysis and properly rejected it.

Bakke involved a prospective student's challenge to a university's quota system that prevented him from competing for 16 of 100 open positions solely on the basis of race. 438 U.S. at 269-70. In sharp contrast, here Yeager was permitted to compete with all who applied for an apprentice position and for each of the open apprentice positions. Yeager was permitted to take the apprentice test (the maximum two times) like everyone else. He was permitted to interview like all those similarly qualified. He was considered for and eliminated from further consideration for the job openings without regard to his race or sex each time he applied, because his apprentice scores were poor. Unlike the plaintiff in Bakke, Yeager was not denied the opportunity to compete for a specified number of openings. He competed and fell far short. [Pet'r App. pp. 7a-8a].[3]

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[3] Bakke also is inapplicable here because that case involved Title VI and constitutional claims against a governmental entity, not a Title VII claim against a private employer. See Northeastern Fla. Chapter, 508 U.S. at 665-66 (citing, inter alia, Bakke and stating that "[w]hen the government erects a barrier" a claimant "need not allege that he would have obtained the benefit but for the barrier in order to establish standing"); United Steelworkers v. Weber, 443 U.S. 193, 206 n. 6 (1979) (similarly distinguishing Title VII claim against private employers from Bakke claims).

## B. YEAGER'S QUESTIONS PRESENTED WERE NOT SQUARELY ADDRESSED IN THE COURTS BELOW BECAUSE HE LACKED ARTICLE III STANDING.

Yeager also suggests that this Court should address sundry Title VII issues concerning: (1) what constitutes a prima facie reverse discrimination case; and (2) this Court's decision in United Steelworkers v. Weber, 443 U.S. 193 (1979). But, as shown, because Yeager lacked Article III standing, this case does not present an appropriate vehicle to address these issues, even assuming a compelling need to do so (which there is not).

Yeager also posits that his Fifth Amendment claim is a proper vehicle for "plenary guidance" from this Court on a "federal action" issue of law. Once again, Yeager fails to identify any authority conflicting with the Sixth Circuit's decision or any other reason why this is a compelling issue. Neither of the cases he cites, NCAA v. Tarkanian, 488 U.S. 179 (1988), and North Georgia Fishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975), dealt with voluntary affirmative action plans.

The Sixth Circuit's holding was squarely in line with other courts addressing the same issue in analogous factual circumstances. See Kipp v. LTV Aerospace & Defense, 838 F. Supp. 289, 293 (N.D. Tex. 1993); McLaughlin v. Great Lakes Dredge & Dock Co., 495 F. Supp. 857, 858 (N.D. Ohio 1980). Both of the lower courts here considered the particular facts of this case (General Motors' status as a government contractor implementing a voluntary affirmative action plan) in granting summary judgment. [Pet'r App. pp. 18a, 30a-31a].

At best, Yeager alleges that the Sixth Circuit misapplied the law to the facts of his case. But see Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law."). Yeager fails to identify any legal authority contradicting the Sixth Circuit's decision, any circuit split on an important federal issue, or any other reason to justify this Court's review of the disposition of his claim.

## II. THE LOWER COURTS DID NOT ERR IN DECIDING THIS CASE.

In any event, summary judgment was properly decided against Yeager on standing grounds. The lower courts thoroughly analyzed the undisputed facts showing that Yeager was not affected by the hiring procedures he challenged with respect to either of his job applications. As discussed, federal courts uniformly and routinely hold that a plaintiff who is not affected by alleged unlawful affirmative action has no standing to sue. [See infra pp. 4-5]. Thus, Yeager had no standing to assert his Title VII claim. [Pet'r App. pp. 9a-15a].[4] Both of the lower courts found, correctly, that the Title VII claim failed alternatively because Yeager had not proven a prima facie case of reverse discrimination. [Pet'r App. pp. 13a-14a].

As well, the Sixth Circuit properly affirmed summary judgment on Yeager's Fifth Amendment claim. The record facts established that General Motors had implemented a voluntary affirmative action plan consistent with its

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[4] Yeager's complaint established that his claimed injury was not being placed in an apprentice job position. [E.g., Pet'r App. pp. 12a-13a].

obligations as a government contractor. The Sixth Circuit correctly found that, because "GMC designed, implemented, and has always administered its apprenticeship program independently from the government," it could not be found to be acting "under color of law." [Pet'r App. pp. 16a-18a]. Yeager cites no relevant authority to the contrary.

## CONCLUSION

The Petition should be denied.

Respectfully submitted,

DANIEL G. GALANT
*Counsel of Record*
GENERAL MOTORS
CORPORATION
300 Renaissance Center
Detroit, MI 48265

ROBERT S. WALKER
JOHN Q. LEWIS
JONES, DAY, REAVIS & POGUE
North Point
901 Lakeside Avenue
Cleveland, OH 44114
(216) 586-3939

*Counsel for Respondent*
*General Motors Corporation*